

**REMARKS**

The present communication is responsive to the Office Action mailed October 29, 2008. A two-month extension of time is transmitted herewith extending the period of reply from January 29, 2008, up to and including March 30, 2009.

Claims 1, 5, 6, 11-13, 15 and 16 were rejected in the Action. Claims 1, 5, 6, 11, 13 and 16 have been amended and no claims have been canceled or added herein. Therefore, claims 1, 5, 6, 11-13, 15 and 16 remain pending in the present application. Support for all claim amendments can be found in Applicants' originally filed disclosure. As such, no new matter has been added. Applicants set forth remarks relating to the Office Action below.

In the Action, the Examiner asserted that Applicants have not complied with one or more conditions for receiving the benefit of an earlier filing date because no petition was filed with Applicants' late claim for priority. In response, Applicants note that enclosed with this Amendment is an "Initial" Application Data Sheet, Request to Correct Filing receipt and a Petition under 37 C.F.R. § 1.78(A)(3) to Correct Priority Information. Applicants respectfully submit that these documents correct Applicants' claim to priority.

The Examiner objected to claims 5, 6 and 11 under CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicants have amended the dependency of claims 5, 6 and 11 such that each claim further limits the subject matter of a previous claim. Applicants respectfully assert the objection to claims 5, 6 and 11 is overcome and should be withdrawn.

The Examiner rejected claims 1, 5, 6, 11-12 and 16 under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 6,190,414 to Young et al. ("the '414 patent") in view of U.S.

Pat. No. 4,759,769 to Hedman et al. ("the '769 patent"), and claims 13 and 15 under 35 U.S.C. 103(a) as being unpatentable over the '414 patent in view of the '769 patent and U.S. Pat. No. 3,659,661 to Young et al. ("the '661 patent").

The Examiner utilized the '414 patent as a primary reference in rejecting independent claims 1, 13 and 16. Applicants respectfully assert that, as disclosed in the '414 patent, applier instrument 102 is used to manipulate telescopic jack mechanism 138. As described in the specification of the '414 patent, telescopic jack mechanism 138 is *releasably mounted* to mounting clamp 124, and mounting clamp 124 is mounted to the distal end of applier instrument 102. See col.4, ll.66-67; col.5, ll.1; and col.5, ll.26-27; Figs. 14-15 and 18-19. Further, what the Examiner referred to in the present Action as a "post" 140, is referred to in the specification of the '414 patent as telescopic jack screw that is housed within spur gear 156 of telescopic jack mechanism 138. Applicants further note that telescopic jack mechanism 138 is a separate mechanism from instrument 102 and that once telescopic jack mechanism 138 is deployed, it has to remain between engaging plates 158, 160 in order to keep engaging plates 158, 160 of implant 104 in an open position.

A *prima facie* case of obviousness cannot be made using the cited references to reject above amended independent claims 1, 13 and 16 or the claims depending therefrom. With respect to independent claims 1 and 16, Applicants respectfully assert that the '414 patent does not disclose, teach or suggest a manipulation tool having a proximal end, a distal end, and a shaft located along a longitudinal axis of the manipulation tool between the proximal and distal ends, "said longitudinal axis of said shaft perpendicular to a longitudinal axis of said engagement holes." Claims 1 and 16 further recite, in part, the

shaft including a central channel coaxial with the longitudinal axis, the central channel housing a post, the post having a first position corresponding to the post being disposed entirely within the distal end of said manipulation tool, and a second position corresponding to said post extending outwardly from said distal end of said manipulation tool. In contrast to the claimed orientation of the shaft of the manipulation tool in relation to the engagement holes of the baseplates, post 140 clearly has an axis parallel to (or can be consider coaxial with) what the Examiner referred to as engagement holes 170, 172 in the '414 patent.

Further, the Examiner could not assert that element 120 in the '414 patent is the post either. There is no indication anywhere in the specification of the '414 patent, that element 120 has a first position corresponding to the post being disposed entirely within the distal end of the manipulation tool and a second position wherein the post extends outwardly from the distal end of the manipulation tool as recited in independent claims 1 and 16. These claim recitations are clearly shown in Figs. 72-82 and are described in at least paragraphs [0143]-[0144] of the originally filed specification. As stated in these paragraphs, bent distal end 4100 of pin 4080 is prevented from entering central channel of shaft 4020 by engaging center flat surface 4200b when pin 4080 is in a first position. In an extended position, pin 4080 is spaced away from central flat surface 4200b. As shown in at least Fig. 73, post 4080 is disposed entirely within the distal end of the manipulation tool. As further described in paragraphs [0143]-[0144], in a second position the post extends outwardly from the distal end of the manipulation tool.

With respect to independent claim 13, Applicants respectfully assert that the '414 patent does not disclose,

teach or suggest a manipulation tool having a proximal end, a distal end, and a shaft, the shaft including a central channel housing a spring and a post, "said post having a bent distal end perpendicular to the central channel of the shaft." Claim 13 further recites, in part, a first position corresponding to the post being disposed entirely within the distal end of the manipulation tool, and a second position corresponding to the post extending outwardly from the distal end of the manipulation tool, wherein the spring in contact with the post biases the post into the first position. In contrast to the claimed orientation of the bent distal end of the post of the manipulation tool in relation to the engagement holes of the baseplates, post 140 is clearly only a longitudinal shaft with no bent end that may engage what the Examiner referred to as engagement holes 170, 172 of the baseplates in the '414 patent. Further, the '661 has a similar structure to what the Examiner refers to as a tool in the '414 patent and cannot be used to cure the deficiencies of the '414 patent. There is simply no bent distal end on a post of the mechanism disclosed in the '661 patent that can be used to engage engagement holes of baseplates as claimed.

While the '769 patent cannot be used to cure the above mentioned deficiencies of the '414 patent with respect to each of the independent claims 1, 13 and 16, the Applicants note that the Examiner is incorrect in asserting that the '769 patent teaches a "tool" that engages a plurality of engagement holes to adjust the height of baseplates. What the Examiner referred to as a "tool" in the '769 patent is rather a spring housed in a recess that is formed in each of inner surfaces of corresponding baseplates. Further, the Examiner noted that the claim term "tool" is being interpreted as an operational device performing a function, but it is incorrect for the Examiner to assert that

springs read on the term "tool" as claimed. The springs disclosed in the '769 patent do not function to manipulate the baseplates at a desired surgical approach aspect as claimed.

For the foregoing reasons, Applicants respectfully assert that a *prima facie* case of obviousness cannot be made using the cited references to reject amended independent claims 1, 13 and 16 or the claims depending therefrom and that each pending claim is therefore in condition for allowance. As it is believed that all of the rejections set forth in the Official Action have been fully met, favorable reconsideration and allowance are earnestly solicited.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

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Respectfully submitted,

By 

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